



FEMA

November 25, 2009

BY HAND-DELIVERY

Clerk of the Board
Civilian Board of Contract Appeals
1800 M Street, N.W.
6th Floor
Washington, D.C. 20036

DOCKET NUMBER: CBCA-1778-FEMA

Dear Sir or Madam:

Please find attached the Response of Federal Emergency Management Agency (FEMA) to the arbitration request submitted by St. Tammany Parish, Louisiana and filed as CBCA-1778-FEMA. Submitted with the Response is a binder(s) of exhibits.

Please add the following Office of Chief Counsel contacts for all notices and correspondence to FEMA related to the arbitration hearing: Linda M. Davis, Associate Chief Counsel – Program Law Division, 202-646-3327 or lindam.davis@dhs.gov; and Kim A. Hazel, Senior Counsel – Program Law Division, 202-646-4501 or kim.hazel@dhs.gov.

Very truly yours,


Diane L. Donley
Senior Attorney
Office of Chief Counsel
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500 C St., S.W.
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cc: Kevin C. Davis
President, St. Tammany Parish

Mark DeBosier
Deputy Director – Disaster Recovery
Governor’s Office of Homeland Security

Gary Jones
Acting Administrator, Region VI
Federal Emergency Management Agency

**ST. TAMMANY PARISH, LOUISIANA
DEBRIS REMOVAL IN COIN DU LESTIN CANALS
PW #18044
FEMA-1603-DR-LA
DOCKET # CBCA 1778-FEMA**

**RESPONSE OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY TO
ARBITRATION REQUEST OF ST. TAMMANY PARISH, LOUISIANA**

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CONTRACT APP

On October 30, 2009, the Federal Emergency Management Agency (FEMA) received the request of St. Tammany Parish, Louisiana (Parish or Applicant) to arbitrate FEMA's denial of \$6,820,000 for debris removal throughout the Coin du Lestin canal system and for reimbursement of associated project management costs expended thus far by the Parish in the amount of \$115,000. This constitutes FEMA's response to the Parish's arbitration request.

JURISDICTION

The Applicant invokes jurisdiction pursuant to The American Recovery and Reinvestment Act of 2009, P.L. 111-5, which establishes the option for arbitration under the Public Assistance (PA) program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603-LA, DR-1604-MS, DR-1605-AL, DR-1606-TX and DR-1607-LA. See 44 C.F.R. § 206.209.

The St. Tammany Parish (Applicant) has met the regulatory guidelines for filing an arbitration request as outlined in 44 C.F.R. §206.209 as follows:

- Project Worksheet (PW) 18044 represents debris removal or channel reclamation declared ineligible by FEMA and is considered by FEMA to be one project.
- The arbitration request for \$6,820,000 exceeds the \$500,000 arbitration project threshold.

- The Applicant has met the October 30, 2009 arbitration request submittal deadline.
- The Grantee forwarded the Applicant's first appeal and included its analysis. It was received by FEMA on December 11, 2008.
- FEMA responded to the Applicant's first appeal on January 15, 2009.
- The Grantee forwarded the Applicant's second appeal on May 11, 2009.
- The pending appeal was withdrawn as stated in the Applicant's arbitration request letter dated October 28, 2009.

SUMMARY OF FEMA'S POSITION

The estimated amount of \$6,820,000 to remove 99,000 cubic yards of debris residing in the Coin du Lestin canals sought by St. Tammany Parish is not eligible under the FEMA Public Assistance (PA) program. The debris deposited by the declared disaster event does not pose an immediate threat to improved property, nor is it eligible as permanent restorative work. FEMA funded all required emergency protective work under PW 2981 (\$130,262). Based upon professional hydrology studies, FEMA has determined that no further emergency protective debris clearance is needed. The permanent work of dredging the canals is not eligible because the canals have not been regularly maintained and the Applicant has not established legal responsibility to dredge the canals. Therefore, the scope of work to remove additional cubic yards of silt, sediment and marsh grass is not eligible under the Public Assistance program. See 42 U.S.C. §§ 5170b, 5172, 5173 and 44 C.F.R. § 206.223.

BACKGROUND

The Stafford Act

FEMA, a component agency of the United States Department of Homeland Security, is responsible for, among other duties, administering and coordinating the Federal governmental response to Presidentially-declared disasters pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act").¹ 42 U.S.C. §§ 5121 *et seq.* The Stafford Act is triggered when, at the request of the governor of a state, the President declares an affected area to be a "major disaster." See 42 U.S.C. § 5170; 44 C.F.R. §§ 206.36; 206.38. When a major disaster is declared, the President determines the types of discretionary assistance that may be made available in the area he has determined is encompassed by the incident – the "declared area." 42 U.S.C. § 5170a.

The Declaration

On August 29, 2005, the President issued a major disaster declaration for the State of Louisiana as a result of Hurricane Katrina pursuant to his authority under the Stafford Act. See 42 U.S.C. § 5170. This declaration under the Stafford Act authorized all categories of Public Assistance, including emergency protective measures and restoration of eligible facilities. See Exhibit 1. The State of Louisiana is the grantee for all FEMA Public Assistance delivered in the State. See 44 C.F.R. § 206.201(e). St. Tammany Parish is a subgrantee (also called here the "Applicant") of the State. See 44 C.F.R. § 206.201(l).

Because the President's declaration included St. Tammany Parish, his declaration made the Parish eligible to apply for FEMA Public Assistance reimbursement for eligible emergency work

¹ The Stafford Act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. 42 U.S.C. § 5164.

and permanent repair or replacement. Emergency work includes measures, such as debris removal, that are necessary to eliminate immediate threats to life and property. See 42 U.S.C. § 5170b; 44 C.F.R. § 206.225. Restoration of eligible facilities includes the repair of a facility to its function immediately prior to the major disaster. An applicant may also apply for funding to replace or relocate a facility, or for an alternate or improved project. See 42 U.S.C. § 5172; 44 C.F.R. § 206.226.

The Stafford Act states that FEMA “may make contributions” for the repair, restoration, and replacement of damaged facilities. See 42 U.S.C. § 5172. Public Assistance (“PA”) allows FEMA, in its discretion, to provide disaster assistance to states, local governments, and certain non-profit organizations if FEMA determines that the applicant, facility, and work meet eligibility requirements. See 44 CFR §§ 206.200-.206.

PA funding may be provided in the form of grants for the state or local government’s own recovery efforts, or FEMA may fund direct federal assistance, which means that either FEMA itself or another federal agency performs the recovery work. See 44 C.F.R. § 206.203; and 44 C.F.R. § 206.208, respectively. FEMA may also fund eligible private nonprofit facilities, such as educational facilities or schools, through a subgrantee. See 44 C.F.R. § 206.223(b).

To receive PA, the applicant must own an eligible facility and meet the work eligibility requirements set forth in FEMA regulations. Specifically, the item of work must be required as a result of the major disaster; the facility must be located within the disaster-declared area; and the facility must be the legal responsibility of the eligible applicant. See 42 U.S.C. § 5122; 44

C.F.R. §§ 206.221-.223; 206.226(c)(1). Under the PA program, a federal inspection team accompanied by a local representative surveys the damage and estimates the scope and cost of necessary repairs. See 44 C.F.R. § 206.202(d). The inspectors record the information they gather on Project Worksheets (“PWs”). Id. PWs document damage caused by the disaster, and list, among other information, the scope and “quantitative estimate for the eligible work.” Id.

After completion of the PWs, FEMA reviews the PW in order to make determinations of whether to approve funding for eligible work. Id. Thereafter, FEMA may make Federal disaster assistance funds available (*i.e.*, “obligate”) based on the final PW. See 44 C.F.R. § 206.202(e). A PW is not a contract between FEMA and the State and/or subgrantee to pay Federal disaster assistance and does not create any right to receive any such Federal funds. See 44 C.F.R. § 206.202(d). A PW only provides estimates, based upon the engineering analysis and on-site investigation, of the anticipated cost of a project. See id. § 206.202(e); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635, 644 (3rd Cir. 1998) (providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States).

Appeals and Arbitration

The Stafford Act authorizes appeals of PA eligibility decisions. See 42 U.S.C. § 5189a. There are two levels of appeal - the first to the Regional Administrator, and the second to the Assistant Administrator for the Disaster Assistance Directorate. See 44 C.F.R. § 206.206(b). The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164-166 (2009) established a new option, arbitration, under the PA program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603, DR-1604, DR-1605, DR-1606, and DR-1607. See 44 C.F.R. § 206.209. A decision of a majority of this Panel will constitute the final decision, binding on all parties, and is not subject to judicial review, except as permitted by 9 U.S.C. § 10. See 44 C.F.R. § 206.209(k)(3).

St. Tammany Parish Project – Coin du Lestin Canal Dredging (Debris Removal)

The private subdivision of Coin du Lestin in St. Tammany Parish is a recreational boating area, which includes three miles of dredged natural waterway canals that receive excess storm runoff from the residential area and then drain into Bayou Bonfouca. See Exhibit 2. The Coin du Lestin subdivision consists of approximately 250 homes, many of which are located along the canals. The subdivision is managed by the Coin du Lestin Property Owners Association, with maintenance responsibility for the common areas of the neighborhoods, including its private boat launch. See Exhibit 3. St. Tammany Parish has not provided any bylaws for the subdivision or legal arrangement of any appropriate kind between the Parish and the subdivision delineating responsibilities for canal maintenance.

As a result of Hurricane Katrina, silt, sediment and marsh grass from the Big Branch National Wildlife Refuge, construction and demolition debris, and wreckage were deposited throughout

the Coin du Lestin area streets, properties and canals. The Applicant claims the canals are owned and maintained by the Parish through the authority granted by the Louisiana Revised Statutes, in particular, R.S. 33 § 1236. See Exhibit 4. This statute does not grant ownership or legal responsibility for these particular canals.

On January 20, 2006, FEMA prepared PW 2914 for St. Tammany Parish to fund emergency protection costs associated with the removal and disposal of 17,297 cubic yards (“CY”) of marsh grass, silt and mud and 69,879 CY of mixed construction and demolition debris. This debris removal was only within the Coin du Lestin neighborhood rights-of-way and cleared 68,526 linear feet of open drainage ditches at an estimated cost of \$1,879,483. No work was funded for removal of debris from the Coin du Lestin canals in this PW. See Exhibit 5.

On February 6, 2006, PW 2981 was prepared. Through six subsequent versions (amendments), total eligible funding reached \$130,262 for additional emergency protective work to include the removal of 162 CY of vegetative debris removal, one vehicle, and four submerged boats from the Coin du Lestin Canals. See Exhibit 6. This work, conducted on private property by the Applicant, was done because it was necessary to remove an immediate threat to the public health and safety of the nearby residents and their homes, and was therefore eligible under the Stafford Act. See 42 U.S.C. § 5170b; 44 C.F.R. §§ 206.224 and 206.225, Disaster Assistance Policy 9523.13. See Applicant Attachment 2 EXH B, 3.

In addition to the eligible debris removal documented and funded through PW 2981 and PW 2914, the Parish persisted in its claim to be reimbursed for deeper dredging of the canals to

remove and dispose of additional silt, sediment and marsh grass throughout Coin du Lestin's three mile system. The Applicant's reasoning was the additional dredging was needed because it constituted a threat to the public health and safety.

In response to the Parish's continual requests to FEMA management to allow debris removal from the canals, James Stark, Director, Louisiana Transitional Recovery Office, notified the Parish that a zero dollar PW would be prepared to enable them to seek funding through the PA appeal process. See Applicant Attachment 2, EXH B, 2. FEMA prepared PW 18044 documenting the existence of an estimated 54,560 CY of debris which was ineligible for removal under the Public Assistance program in the amount of \$6,820,000. See Applicant Attachment 1.

PROCEDURAL HISTORY

First Appeal

The Parish applied to FEMA for reimbursement under the Public Assistance program and FEMA prepared Project Worksheet (PW) 18044 denying funding for additional debris removal throughout Coin du Lestin's drainage canal system. See Applicant Attachment 1. In a letter dated August 4, 2008, the Parish filed a first level appeal with FEMA requesting an estimated \$6,820,000 in funding to remove a total of 99,000 cubic yards (CY) of debris including marsh grass, sediment, and silt to reduce the threat of flooding and to restore the canals to their pre-disaster depth.² See Applicant Attachment 2, EXH B.

² The Parish presents a first appeal of PW #2981 and #2981(V1) in their arbitration request. See Applicant Attachment 4. The Parish has not included evidence with this appeal showing it was issued to the State of Louisiana in accordance with 44 C.F.R. § 206.206(c)(1). Nor is there evidence the appeal has been forwarded to the Regional Administrator in accordance with 44 C.F.R. § 206.206(c)(2) in order to afford FEMA the opportunity to respond to the claimed first level appeal in which this dispute originally resides. In an effort to insure FEMA had not received the aforementioned appeal, a request of the Public Assistance Expedited Information Response (PAXIR) group was sent to verify the receipt or communication of said appeal had not been received by the Louisiana Transitional Recovery Office (LATRO). See Exhibit 8. No appeal was received by the LATRO.

In its first level appeal decision FEMA denied this funding on January 15, 2009, based on findings included in a FEMA hydrology study dated November 19, 2007. See Exhibit 7. This study concludes the canals in their current state function to withstand a 5-year storm event and the debris remaining did not pose an immediate threat to public health and safety of the Coin du Lestin subdivision. Furthermore, FEMA determined the canals were not eligible facilities for permanent work because a dredged natural waterway does not constitute an engineered facility³ and because affidavits provided by the Parish had not established the Parish had a regular clearance schedule to maintain a designed canal depth. See Applicant Attachment 2, EXH. B.

Second Appeal

On March 13, 2009, the Applicant filed a second appeal with FEMA reiterating their first appeal objections which purported to refute FEMA's hydrology study that showed the deposited marsh grass and silt did not constitute an immediate threat to the community. See Applicant Attachment 2. On October 28, 2009, the Applicant withdrew its second appeal request in favor of pursuing arbitration pursuant to 44 C.F.R. §206.209. See Applicant Attachment 3.

Request for Arbitration

The Parish now has filed a request for arbitration seeking \$6,820,000 for the removal of 99,000 CY of debris removal from the Coin du Lestin canals. In addition, the Applicant seeks \$115,000 for their project management costs for the engineering report (WINK Report) identifying desired canal profiles and core samples within the three Coin du Lestin canals. The Applicant asserts it

³ An eligible facility as it pertains to improved and maintained natural features is that the improvement should be based on a documented design that changes and improves the natural characteristics of the feature. PA Guide, FEMA 322/October 1999 at 16.

is entitled to funding for removal of this debris under either emergency work or permanent work as authorized by the Stafford Act. See Stafford Act, Section 403, 406, 407; see Exhibit 9.

Submission by the Grantee in Support of the Applicant

Pursuant to 44 C.F.R. § 206.209(e)(3), the Grantee forwarded a written recommendation in support of the Applicant's request for arbitration which was received by FEMA on November 17, 2009. See Exhibit 9A. No additional issues were presented by the Grantee for FEMA consideration. Id.

STANDARD OF REVIEW

While the ARRA provides for a limited waiver of immunity, it is silent as to the standard of review to be used in the arbitrations. However, the text of the ARRA clearly **contemplates an "arbitrary and capricious" -- and not a *de novo* -- standard of review.** First, the provision "the President shall establish an arbitration panel *under* the Federal Emergency Management Agency public assistance program," (emphasis added) illustrates two clear concepts: (1) the Executive Branch is responsible for establishing the arbitration panel and defining its authority; and (2) the authority is "under" the FEMA PA program. It does not follow from that phrase that Congress intended a *de novo* review.

Second, the express purpose of the arbitration panel is "to expedite the recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast Region." Again, the plain text does not contemplate a *de novo* review that will duplicate previous time-intensive efforts to determine the amount of hurricane damage to facilities that is eligible for a grant under FEMA's PA program.

Third, the ARRA grants the arbitration panel "*sufficient authority* regarding the award or denial of disputed public assistance applications for covered hurricane damage under section

403, 406, or 407 of [the Stafford Act].” (emphasis added). The phrase “sufficient authority” indicates that this Panel’s authority is not absolute. Congress could not have intended the arbitration panel to have review authority that exceeds that of any Federal court. Indeed, this was settled by the Supreme Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985), where the Court noted that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”⁴ By implementing the appropriate “arbitrary and capricious” standard, the arbitration panel has sufficient review authority.

Finally, the ARRA tasked the arbitration panel to make determinations regarding the “award or denial” of the PA application for “covered hurricane damage.” Again, the ARRA provides for review of the prior administrative proceedings – the “award or denial” – not for an independent evaluation. The plain meaning of the phrase “covered hurricane damage” is that damage for which FEMA reimbursement is authorized by the Stafford Act. The ARRA plainly does not expand FEMA’s authority under sections 403, 406 and 407 to provide Federal funding for hurricane damages and an arbitration panel must also necessarily be guided by, and limited to, the scope of sections 403, 406 and 407.

The arbitration panel must also consider “general principles respecting the proper allocation of judicial authority to review agency orders” when making its decision regarding the standard of review. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 737 (1985). It is well-settled that review of Agency action, where Congress has not designated a standard of review,

⁴ An arbitration under the ARRA is a unique circumstance resulting from special legislation specific to a particular set of entities that mandates FEMA, as the entity charged with implementing the Stafford Act, participate. It is therefore akin to an arbitration where one party is required to pursue a statutory claim. See, e.g., Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1468-69, 1476 (D.C. Cir. 1997) (comparing arbitration under a collective bargaining agreement where nearly unlimited deference is paid with an arbitration of a statutory claim where such deference is “not appropriate”).

defaults to the arbitrary and capricious standard articulated in the Administrative Procedure Act (APA), 5 U.S.C. § 706:

In cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, [the Supreme Court] has held that consideration must be confined to the administrative record and that no de novo proceeding may be held.

United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) (citing Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930); Nat'l Broad. Co. v. United States, 319 U.S. 190, 227(1943)). Accordingly, courts consistently hold that, in the absence of a statutorily-defined type of review, the reviewing body must seek guidance in the APA and only “hold unlawful or set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’ ” GTE South, Inc. v. Morrison, 1997 U.S. Dist. LEXIS 23871 (E.D. VA) (citing 5 U.S.C. § 706(2)(A)); see Clark v. Alexander, 85 F.3d 146, 151-52 (4th Cir. 1996); Guaranty Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 794 F.2d 1339, 1342 (8th Cir. 1986) (proper to look to the APA and apply the arbitrary and capricious standard where statute did not define the type of review); see also Cabinet Mountains Wilderness v. Peterson, 222 U.S. App. D.C. 228, 685 F.2d 678 (D.C. Cir. 1982); Am. Canoe Ass'n v. United States EPA, 46 F. Supp. 2d 473, 476 (E.D. Va. 1999).

The APA standard for review of FEMA’s public assistance decisions has been explained by the 9th Circuit when reviewing a decision by FEMA to deobligate certain costs from a PA grant:

Under the APA, we may set aside agency action only if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The standard is a narrow one, and the reviewing court may not substitute its judgment for that of the agency. However, the agency must articulate a rational connection between the facts found and the conclusions made. Also, we must

give substantial deference to an agency's interpretation of its own regulations.

Pub. Util. Dist. No. 1 of Snohomish County, Washington v. Fed. Emergency Mgmt. Agency, 371 F.3d 701, 706 (9th Cir. 2004) (internal citations omitted). See also Graham v. Federal Emergency Management Agency, 149 F.3d 997, 1007 (9th Cir. 1998) (applying APA and arbitrary and capricious standard where decision is not discretionary).

DISCUSSION AND ANALYSIS

To address the merits of the Applicant's request, it is necessary to discuss the two types of eligible work that may be funded under the PA program. The first type of work is emergency work. These are emergency protective measures which, in order to be eligible, must eliminate or lessen immediate threats to life, public health or safety; or eliminate or lessen immediate threats of significant additional damage to improved public or private property through measures which are cost effective. See 44 C.F.R. § 206.225(a)(3). The second type of work is permanent work. For this type of work to be eligible it must be restorative work that must be performed through repairs or replacement, to restore an eligible facility on the basis of its pre-disaster design and current applicable standards. For permanent work to be eligible it must be required as the result of the major disaster event, it must be located in a designated disaster area, and it must be the legal responsibility of an eligible applicant. See 44 C.F.R. §§ 206.201(g), 206.226.

The Applicant is disputing the findings of PW 18044 that additional dredging to remove an additional 99,000 CY of debris from the canals at an estimated cost of \$6,820,000 is not eligible for FEMA funding. FEMA's position is that the work meets neither the criteria for emergency work, nor the criteria for permanent work.

Dredging the canals as defined in PW 18044 does not meet eligible emergency work criteria

As defined above, emergency work is that work needed to protect improved public or private property from an immediate threat. FEMA defines an immediate threat from flooding or a hurricane to exist if improved property could be exposed to flooding from a 5-year event. This is not a flood that necessarily happens within 5 years, but a flood that has a 20 percent chance of occurring in any given year. See Public Assistance Guide, FEMA 322 at 66.

To determine whether the remaining debris in the canal system posed an immediate threat from a 5-year event, FEMA conducted a hydrology study. Thomas Schultz, Ph.D., a certified hydrology engineer⁵ summarizes the report findings as follows:

Conclusions: In the team's professional opinion, sediment does not impede the drainage structures that drain the subdivision. The drainage structures will operate at the capacity which they operated at before Hurricane Katrina. It can also be concluded from the visit the day after the rain event and the boat tour that some marsh grass still exists along the edge of the canals. Based on these field observations, the canal system as cleaned to date will pass the five year storm. There is no need to conduct additional cleaning of the canals to meet the requirements to pass the 5 year event safely through the subdivision. There is no evidence in the files or at the site that the canals have had any maintenance other than the clean up covered in PW 2981.

Recommendations:

The work completed to date is all that is eligible under FEMA PA guidelines. The vegetative debris has been removed. The drainage system is clean and operating in the fashion it did before the disaster. The Canals function to pass the 5-year storm which meets FEMA's emergency life and safety requirements. Exhibit 7.

The Applicant then decided to conduct its own drainage analysis, performed by Donald E. Barbe', Ph.D. The findings of Dr. Barbe' conflict with the findings of Dr. Schultz. Barbe's analysis concluded:

⁵ Thomas Schultz, Ph.D., performed the hydrology study, in conjunction with FEMA debris staff, to determine whether the effect of a 5-year flooding event would have on the sub-division surrounding the Coin du Lestin canals. See Exhibit 11 for Dr. Schultz credentials. See Exhibit 7 for full report.

The marsh grass that was deposited by Hurricane Katrina must be removed to be able to pass a five-year return interval runoff. It increases the roughness of the bed, which causes a drag on the flow and an increase in the water level of 1.5 feet. The survey completed by Wink Engineering show that approximately 65,300⁶ cubic yards must be removed to clear all the canals. If the marsh grass indicated by Wink Engineering is removed, the canals will be able to handle a 5-year return interval runoff event.

Applicant Attachment 2 EXH B, 16 at 8.

In an effort to reconcile the two professional reports, FEMA had a team of technical hydrology professionals (see Exhibit 11) review the Applicant's drainage analysis and perform another analysis specific to a 5-year flood. Their analysis concludes:

"The increase in water surface profile from the 5-year rainfall is negligible as it does not exceed 0.1 foot in any of the three canals. This means that the 5-year event will not result in any significant additional damage, and dredging of the canals will not reduce the damage from a 5-year event." Exhibit 12.

Based on the collaborative findings of these professionals, the eligible work already completed and funded under PW 2981 is sufficient to alleviate the immediate threat as required by the Stafford Act. See Exhibit 6. Any additional debris clearance within the canals as defined on PW 18044 would exceed the definition of eligible emergency work and therefore is not eligible for FEMA funding. See Applicant Attachment 1.

The Applicant claims that FEMA failed to consider information provided by the Parish and this failure to consider this information was arbitrary and capricious. See Exhibit 9 at 2. To satisfy the doubts raised by the Applicant's engineer and as a cross check for the FEMA hydrology engineering teams, FEMA provided Barbe's rebuttals to the hydrologists for review. Upon their

⁶ 65,303 CY represents WINK estimate of storm related debris and 99,000 CY represents WINK estimate of total volume to restore the original unsubstantiated original canal design profile.

reviews, both FEMA teams confirmed that, contrary to Barbe' professional opinions, their original findings of sufficient drainage were scientifically accurate. See Exhibit 13 and 14. Furthermore, contrary to the Applicant's allegations, upon receipt of the Applicant's refuting information from its expert, FEMA did its due diligence to verify that the new information did not affect the hydrologists' initial conclusions. While the Parish may assert that FEMA's actions were arbitrary and capricious, the intent of the appeal process pursuant to 44 C.F.R. § 206.206 is to allow two levels of appeal review. FEMA's practice is to evaluate any conflicting summations during the second appeal review.

The Applicant has further attempted to sensationalize its request for dredging by claiming that the "one death has already been reported as attributable to the marsh grass deposited in these canals since Katrina." In review of the newspaper article cited, it will become apparent that the death is unrelated to the work requested by the Applicant, because the accident took place in a different body of water (see Exhibit 2), and a contributing factor to the accident may have been alcohol. Another major contributor to the accident was the victim's apparent lack of use of a flotation device. See Applicant Attachment 2, EXH B, 18.

Dredging the canals as defined in PW 18044 does not meet eligible permanent work criteria

The Public Assistance Guide, FEMA 322/October 1999 at 16, defines an eligible facility under the Public Assistance Program:

FEMA defines a facility as a publicly or private non-profit owned building, works, system, or equipment; or, certain improved and maintained natural feature. Furthermore, the improvement of a natural feature should be based on a documented design that changes and improves the natural characteristics of the feature. Upon completion of an improvement, a subsequent measurable difference in the performance over the unimproved natural feature should be

shown. The maintenance of this improvement must be done on a regular schedule and to standards to ensure that the improvement performs as designed. It is the improvement itself that must be maintained for the natural feature to be considered a facility.

The Applicant has not demonstrated that the canals to be dredged meet all of the FEMA requirements related to a natural feature as set forth above, including, 1) that the canals are an improved and maintained natural feature; 2) that the improvement is based on a documented design; 3) that the documented design changes and improves the natural characteristics of the feature; 4) that after improvement completion, a measurable can be shown in the difference in the performance over the unimproved natural feature; 5) the maintenance of the improvement is carried out on a regular schedule; and 6) the maintenance is carried out to standards so that the improvement performs as designed. Therefore, the canals in dispute are not eligible facilities as defined by FEMA's PA program. Unless the Applicant can demonstrate that all of these provisions are met, PW 18044 does not qualify as an eligible project.

For permanent work to be eligible it must be restorative work that must be performed through repairs or replacement to restore an eligible facility on the basis of its pre-disaster design and current applicable standards, and the work must be the legal responsibility of an eligible applicant. See 44 C.F.R. §206.223.

I. The Applicant is unable to document the pre-disaster design or maintenance.

The Applicant has been unable to produce records to show the pre-disaster level of debris in the canal to determine the amount of newly deposited disaster-related debris. Additionally, the Applicant has not demonstrated that it has conducted a regular clearance schedule to allow the canal to be considered a routinely-maintained facility. In lieu of providing maintenance records,

the Applicant submitted employee affidavits; see Applicant Attachment EXH B, 8, 9, and 10, showing performance of minimal “as needed” maintenance of the canals subsequent to the subdivision developer clearing and widening of the natural drainage ways. See Exhibit 9 at 5, footnote 3. As noted in PW 18044, the canal was last dredged in 1994. See Exhibit 15, Affidavit of R.B. Williams. No documentation has been provided regarding who funded or performed the work.⁷

Having no pre-disaster records to show the depths of the canals, the Applicant hired Wink Engineering in 2008, to determine the amount of disaster-related debris in the canals. See Applicant Attachment 7. The Wink Engineering survey concluded a total of 99,141 CY of marsh grass, silt, and sediment will have to be removed in order to restore the original design capacity of the canals.⁸ This determination was based on core boring reports, cross-sectional diagrams of the canals,⁹ and estimates of canal depths calculated using the dimensions of grounded vessels that were able to navigate the canals prior to Hurricane Katrina. Of this total, the Wink survey calculated approximately 65,303 CY of vegetative material (marsh grass) of varying thicknesses existed along the bottom of the canals. See Applicant Attachment 7. The core borings, cross-sectional diagrams and depth surveys included with the Wink report are provided to identify the disaster-related debris remaining in the canals and to identify how much debris must be removed to achieve the applicant’s desired original designed canal depth. See Applicant Attachment 7.

⁷ As stated before, it is unclear as to who provided the funds and/or conducted the maintenance on the Coin du Lestin canals in 1994. Furthermore, it was at this same time the nearby Big Branch National Wildlife Refuge was established which is separated from Coin du Lestin by Bayou Bonfouca. See Exhibit 16. Given the fact the refuge area was established in the same year as the last known maintenance of the canals, brings into question who performed the maintenance in 1994 and for what reason(s).

⁸ Although the Applicant never provides a definitive pre-storm depth of the canals, the WINK cross sectional diagrams indicate this to be eight feet. Applicant Attachment 7.

⁹ The cross sectional datum used in the WINK report are not cross-referenced to any original as-built drawings depicting the specifics of the modification to the natural feature.

Utilizing the Applicant's data, FEMA engineers calculated the volume of sediment that is considered storm-deposited material. From these new calculations, FEMA has determined only 36,690 CY can scientifically be considered a direct result of Hurricane Katrina. See Exhibit 17. Based on the requirement that work be the result of a major disaster event, the 'potentially eligible'¹⁰ amount of debris removal is 36,690 CY, which is a 44 % reduction in volume from the applicant's estimate of 65,303 CY. See 44 C.F.R. § 206.223(a)(1). However, the additional provisions of 44 C.F.R. § 206.223(a)(3) require that the work can only be performed if it is the legal responsibility of the Applicant.

II. The Applicant has not demonstrated legal responsibility to dredge the canals

If the facility [canals] is the legal responsibility of an eligible applicant, then the restoration of the pre-disaster carrying capacity of the canals **may** be eligible, but maintenance records or surveys **must** be produced to show the pre-disaster capacity of these facilities. See PA Guide, FEMA 322/October 1999 at 55.

The Coin du Lestin subdivision is maintained by a private homeowner's association that appears to charge annual membership dues of \$100 and allows only private access to the boat launch within the development. See Exhibit 18. Private homeowner associations do not meet FEMA's definition of an eligible applicant. See 44 C.F.R. § 206.222. Since ownership of the canals has not been established, the dredging may be the legal responsibility of the homeowner's association whose members benefit from the use of the canals. Furthermore, St. Tammany Parish President, Kevin C. Davis, certifies in his Arbitration Request that upon completion of the

¹⁰ 'Potentially eligible' because legal responsibility has not been determined.

original phases of the drainage system **the canals were never formally accepted by the Parish.**
See Exhibit 10 at 5, n. 3.

The Applicant argues that it has legal responsibility for the permanent restoration of the canals; however, as of this date (more than four years after the hurricane) the Applicant has not performed its alleged legal responsibilities. The relevant Louisiana Revised Statute, LA RS 33:1236, gives the Applicant the authority to make regulations for its own government and gives it the power to regulate the clearing of the banks of rivers. This authority to regulate does not necessarily convey ownership or legal responsibility for the property in question. LA RS 33:1236(3) grants to Parish governing bodies the ability to regulate the clearing of banks and rivers and natural drains; for the clearing of the banks of the Mississippi River and all other navigable streams and natural drains for the purpose of securing free passage for boats and other water craft. This general authority does not convey legal responsibility or ownership of the Coin du Lestin canals, but rather grants a general authority to regulate clearing activity. The Applicant points to a specific Police Jury Resolution as evidence that the maintenance of the Coin du Lestin area was released to the Parish, however the document is silent in regard to maintenance of the canals, and only shows the Parish giving authorization of an individual to install a sub-surface drain within the right-of-way in the Coin du Lestin development. See Applicant Attachment 2 EXH. B, 8.

Applicant points to LA RS 33:1236(13) as further evidence of its legal responsibility, but has failed to provide evidence that the provisions of this subsection apply to the canal within the Coin du Lestin development. Evidence of legal responsibility might include Deeds, Titles,

Surveys or easement documentation showing that ownership rests with St. Tammany Parish. Resolutions and/or Ordinances passed that show legal responsibility with regard to these canals may also be considered sufficient evidence. Other evidence that could help the Applicant's claim might include the incurrence of debt or the issuance of bonds for this drainage canal, or evidence of State Aid provided to St. Tammany Parish by the State of Louisiana for the maintenance of these canals. If, as the Applicant contends, these canals are there for the purpose of the free passage of boats, then the canals' plans and specifications for maintenance and dredging which the Parish prepared would also assist in proving ownership and legal responsibility. Applicant must be able to produce documentation as required by 44 CFR § 206.223(a)(3) sufficient to demonstrate an affirmative legal duty to maintain, or repair this property. The Applicant has not done so.

The Applicant opines that all the maintenance records were destroyed in the flood; and as an effort to establish regular routine maintenance, employee affidavits were provided. The Affidavits of the Parish's Department of Public Works staff were examined during the formulation of the first-level appeal process, and were determined to be missing key information which would have shown, without question, financial responsibility and regularly scheduled maintenance conducted by the Parish of the canals. See Applicant Attachment 2, EXH A.

If the Applicant is able to produce documentation as required by 44 C.F.R. § 206.223(a)(3) sufficient to prove legal responsibility to the Arbitration Panel, FEMA will consider the removal

of debris directly related to the disaster, with the contingency that the Applicant remove the remainder of the requested debris at its expense.¹¹

Applicant claims FEMA is inconsistent in its eligibility determinations

The Applicant claims FEMA determined that dredging canals in Plaquemines Parish was eligible and its situation with dredging the Coin du Lestin canals is no different.¹² The only similarity between the two applicant scenarios involved emergency work. In regards to permanent work, the dredging of the canal to pre-disaster design for Plaquemines Parish was deemed eligible by FEMA because Plaquemines Parish could produce evidence that the 105 miles of interconnected channel and pumps were both designed and maintained. In direct contrast, St. Tammany Parish cannot produce the same evidence; consequently, FEMA's eligibility determinations are appropriately different.

Additionally, the Applicant claims FEMA has refused to clear the debris from Coin du Lestin canals when it paid for the removal of the same type of debris through ten other PWs in St. Tammany Parish. In fact, only two of the ten PWs include the removal of marsh grass and silt, and are both in the Coin du Lestin sub-division (PW 2914 and 2981). The other eight PWs are written for the extraction and removal of hazardous vegetative debris, C&D, submerged boats, vessels, vehicles, white goods, and household hazardous waste products that were deposited in the Applicant's ditches, canal systems and waterways, not marsh grass and silt. See Exhibit 19.

¹¹ If the Applicant had satisfactorily demonstrated that it has the legal responsibility to remove debris from the canals, and at the Applicant's request, FEMA may have funded the additional 36,690 CY of potentially eligible work related to the removal of storm-related debris. However, the Applicant, at its expense, would need to remove the additional pre-disaster debris of 62,451 CY to obtain its desired total of 99,141 CY of debris removal.

¹² Plaquemines Parish facility is considered a critical flood control facility as it is 105 miles of interconnected engineered channels and pumps that disperse storm runoff to prevent flooding in the Parish. See Applicant Attachment 5 at 5.

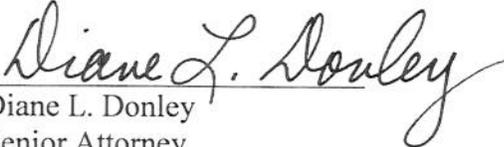
Request for Project Management Costs

The Applicant's request for \$115,000 for project management cost (WINK report fees) is not eligible because the work is related to an ineligible permanent work project. If the project becomes an eligible project, then this cost could be considered engineering services necessary to complete eligible work and would be eligible for PA funding. See PA Guide, FEMA 322 at 75 - 80. If the project is not eligible, then the efforts to identify damages are also not eligible for FEMA funding. Generally, costs that can be directly tied to the performance of eligible work are eligible. See PA Guide, FEMA 322 at 33.

CONCLUSION AND RECOMMENDATION

The Applicant's request for \$6,820,000 to remove debris from the Coin du Lestin canals is not eligible for reimbursement under the Public Assistance Program. FEMA has approved \$130,262 for the eligible emergency protective debris clearance of the canals. The scientific analysis of more than one independent hydrology expert shows no need for further dredging to alleviate an immediate threat from a 5-year flooding event. Therefore, FEMA respectfully requests that the Panel find in favor of FEMA, deny the Parish's request for further debris removal (dredging) and deny project management costs associated with the Coin du Lestin canals.

Respectfully submitted on this 25th day of November 2009 by,


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Attachments

Cc: Kevin C. Davis
President, St. Tammany Parish

Mark DeBosier
Deputy Director – Disaster Recovery
Governor’s Office of Homeland Security

Gary Jones
Acting Administrator, Region VI
Federal Emergency Management Agency

LIST OF EXHIBITS

- Exhibit 1 – Major Disaster Declaration FEMA-1603-DR-Louisiana, with Cost Share Amendments.
- Exhibit 2 – St. Tammany Parish Bayou and Canal Area Map.
- Exhibit 3 – Coin du Lestin Property Owner's Association Web Home Page.
- Exhibit 4 – Louisiana Revised Statute Title 33 §1236.
- Exhibit 5 – Project Worksheet 2914, with attachments.
- Exhibit 6 – Project Worksheet 2981, Versions 0 – 6 with attachments.
- Exhibit 7 – Hydrology Report by Thomas R. Schultz, Ph.D.
- Exhibit 8 – E-mail Request for First Appeal Record of PW 2981.
- Exhibit 9 – St. Tammany Parish Submission to Arbitration.
- Exhibit 9A – Grantee Recommendation – Re: CBCA No. 1778-FEMA
- Exhibit 10 – Thomas R. Schultz, Ph.D. Resume.
- Exhibit 11 – ERPMC Resumes.
 - Arthur C. Miller, PhD, P.E., PLS, PH, D.WRE.
 - Daryle L. Fontenot, P.E., CFM.
 - Cheryl Johnson, P.E., CFM.
 - Perry Rhodes, P.E.
- Exhibit 12 – Five-Year Flood Analysis by ERPMC.
- Exhibit 13 – Review of Barbe' Report by Thomas R. Schultz, Ph.D.
- Exhibit 14 – Review of Barbe's Report by ERPMC.
- Exhibit 15 – Project Worksheet 18044, with attachments.
- Exhibit 16 – Big Branch Marsh National Wildlife Refuge Information
- Exhibit 17 – Response to Wink/Eustis Report by Thomas R. Schultz, Ph.D..
- Exhibit 18 – Coin du Lestin Membership Form, Phase Diagram and Restrictions 1 -5.
- Exhibit 19 – Project Worksheet Comparison, PW 2914, 2981, 2983, 2984, 2986, 2990, 3100, 6785, 14066, 14921.